BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2020-263-E

In Re: Cherokee County Cogeneration Partners, LLC, Complainant, v. Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, Respondents.	)	**DUKE ENERGY CAROLINAS, LLC'S AND DUKE ENERGY PROGRESS, LLC'S RESPONSE TO REQUEST FOR INTERIM RELIEF**

Pursuant to S.C. Code Regs. 103-829(A), and other applicable South Carolina law or rules and regulations of the Public Service Commission of South Carolina (the "Commission"), Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP" and, together with DEC, "Duke Energy" or the "Companies"), respond to the Request for Interim Relief[1] of Cherokee County Cogeneration Partners, LLC, ("Complainant") as follows:

I. INTRODUCTION AND BACKGROUND

i. Complainant

Complainant is a Qualifying Facility ("QF") subsidiary of LS Power Group, Inc. ("LS Power"), which owns and operates a cogeneration power production facility located in Gaffney,

[1] The Companies are responding herein specifically to Complainant's Request for Interim Relief, in advance of the oral argument on this issue scheduled for December 10, 2020 and will submit their Answer to the Complaint on December 21, 2020, as required by Commission Notice issued on November 19, 2020.

South Carolina (the "Cherokee Facility"). LS Power is a sophisticated and experienced player in the power sector, having "developed, constructed, managed and acquired more than 42,000 MW of competitive power generation and over 630 miles of transmission infrastructure" across North America.[2] LS Power has raised in excess of **$45 billion** in debt and equity financing to support its North American infrastructure.[3] LS Power acquired the Cherokee Facility from NextEra Energy Resources, LLC, in September 2011.

ii. PURPA

Pursuant to Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), electric utilities such as DEC and DEP are required to offer to purchase electric energy from qualifying cogeneration and small power production facilities called "Qualifying Facilities" or "QFs."[4] This utility obligation to purchase power from QFs is known as the "mandatory purchase obligation" under PURPA. Congress delegated to state commissions the responsibility of implementing FERC's regulations, including PURPA's mandatory purchase obligation.[5] In 1980, FERC issued Order No. 69, establishing regulations to implement PURPA.[6] Amongst FERC's regulations to implement PURPA, FERC prescribed additional details regarding electric utilities' obligation to purchase energy and capacity made available by QFs, including expressly prescribing that electric utilities shall not be required to pay more than the avoided costs for purchases from QFs.[7]

[2] *See* www.lspower.com/about-us/ (last visited Dec. 7, 2020).
[3] *Id*.
[4] *See* 16 U.S.C. § 824a-3(a). QFs include both small power production facilities (solar, wind, and other renewable technologies) up to 80 MW as well as cogeneration facilities. *See generally* 18 CFR § 292.203.
[5] *See* 16 U.S.C. § 824a-3(f); *see also FERC v. Mississippi*, 456 U.S. 742,750-51, 102 S.Ct. 2126 (1982).
[6] *Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶30,128, (1980) ("Order No. 69") (establishing regulations to implement PURPA).
[7] *See* 18 C.F.R. 292.303(a); 18 C.F.R. 292.304(a)(2).

iii. The expiring 2012 Cherokee PPA

DEC and Complainant are parties to a power purchase agreement ("PPA") executed in June 2012 pursuant to DEC's obligations under PURPA (the "2012 Cherokee PPA"). The 2012 Cherokee PPA was filed with the Commission in Docket No. 2012-272-E and was accepted for filing by the Commission in Order No. 2012-743 issued September 19, 2012. Based upon the mutual agreement of DEC and Complainant at the time the 2012 Cherokee PPA was executed, the PPA terminates on December 31, 2020.

The public version of the 2012 Cherokee PPA is attached hereto as Exhibit A. Order No. 2012-619 granted DEC's request for confidential treatment for portions of the 2012 Cherokee PPA. Consistent with the Commission's determination in Order No. 2012-619, the Companies respectfully request that the Commission find that pursuant to S.C. Code Ann. Regs. 103-804(S)(2) and S.C. Code Ann. § 30-4-40(a)(1), those same provisions of the 2012 Cherokee PPA are exempt from disclosure under the Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 *et seq*. for the purposes of this proceeding. The Companies respectfully request permission to file the confidential version of Exhibit A under seal and that shall be maintained as confidential pursuant to Order No. 2005-226.

The 2012 Cherokee PPA is a unique negotiated arrangement under PURPA, whereby DEC dispatches the Cherokee Facility on a daily and intra-day basis to receive the full energy output of the Cherokee Facility. DEC purchases from third parties all fuel required for the Cherokee Facility.[8] Thus, for energy delivered, DEC pays a variable operations and maintenance ("O&M") price and a unit start price. DEC also makes fixed payments to Complainant, which include both

[8] QFs and utilities have the right to negotiate PPAs required to purchase their output in lieu of the QF asserting a mandatory purchase obligation by the utility. *See generally* 18 CFR § 292.301(b).

a capacity charge and a fixed O&M charge, as set forth in Article 5 and Attachment 2 of the 2012 Cherokee PPA.

iv. Recent negotiations towards new PPA

Duke's forthcoming Answer to the Complaint will more fully respond to Complainant's allegations regarding negotiations between Duke and Cherokee, many of which grossly mischaracterize Duke's continuing good faith efforts to negotiate a new PPA with Cherokee. For purposes of addressing Cherokee's request for interim relief, Duke provides the Commission the following background, as well as affidavits of two Duke employees with direct knowledge and involvement in the negotiations.

As described in the Affidavit of Michael T. Keen, in July 2018, Duke Energy representatives first approached Complainant to discuss a successor PPA for the 2012 Cherokee PPA. As the Companies will detail in their Answer to the Complaint, since that time, the Companies have engaged in extensive discussions with Complainant, providing indicative avoided cost rates for both DEC and DEP, as requested by Complainant, as well as providing explanations for the derivations of such avoided cost rates that are consistent with information that Duke routinely provides to all other QFs. DEC and DEP each provided a form PPA for Complainant's review, which Complainant has chosen not to execute. The Companies have fully satisfied their obligations under PURPA, FERC's regulations and precedent, and South Carolina law and precedent, and have acted in good faith, by offering to purchase the output of the Cherokee Facility at the Companies' current avoided capacity and energy rates.

On November 2, 2020, less than sixty days before the expiration of the 2012 Cherokee PPA, Complainant filed a Complaint with this Commission. The specific relief requested in the Complaint is unclear, but Complainant requests "the Commission hear all unresolved issues

necessary for formation of a PPA between [Complainant] and [the Companies] . . . ."[9] While the legal issues raised in the Complaint are complex (as are the facts underlying the dispute), put simply, Complainant believes that DEC or DEP should be required to pay higher rates for the energy and capacity from the Cherokee Facility, compared to rates calculated based upon either DEC's or DEP's current avoided costs that are appropriate and lawful under PURPA. The Complaint also includes a Request for Interim Relief, requesting that the Commission order DEC (and by extension, DEC's customers) to continue paying Complainant for avoided energy and capacity on the same terms contained in the 2012 Cherokee PPA, until the Commission has made a determination on the merits of the Complaint.[10]

v. Procedural Background

Notably, on the same day that Complainant filed the Complaint with this Commission, Complainant filed an almost-identical complaint before the North Carolina Utilities Commission ("NCUC"), asking for the same relief, including asking the NCUC for injunctive relief to extend the term of the SC-jurisdictional 2012 Cherokee PPA, until such time as the NCUC adjudicates the Complaint.[11] It is unclear to Duke how Complainant seeks identical relief from the NCUC to adjudicate the Companies' avoided cost rates and obligation to purchase from a SC-jurisdictional QF while requesting relief from this Commission.

On November 19, 2020, the Commission issued the Notice in this proceeding, requiring the Companies' file their Answer to the Complaint by December 21, 2020.[12] On November 30,

[9] Complaint at 19.
[10] Complaint at 19-20.
[11] Complaint and Petition for Arbitration of Power Purchase Agreement and Request for Interim Relief, N.C.U.C. Docket No. E-2, Sub 1256, E-7 Sub 1240 (filed Nov. 2, 2020).
[12] Pursuant to S.C. Code Ann. Regs. 103-831 and Rule 6(a) of the South Carolina Rules of Civil Procedure, given that the 30-day deadline to file an Answer falls on a Saturday (Dec. 19, 2020), the Answer is due on the next business day, which is Dec. 21, 2020.

2020, Complainant filed with the Commission a request for an oral argument to be held on Complainant's Request for Interim Relief. On December 2, 2020, the Commission issued a Notice of Oral Argument, which is scheduled for December 10, 2020.

II. ARGUMENT

The Commission should deny Complainant's Request for Interim Relief. First, the relief requested by Complainant amounts to preliminary injunctive relief, which is beyond the Commission's statutory authority to provide. Additionally, granting the requested relief would cause DEC's customers to purchase the output of the Cherokee Facility at rates significantly above DEC's current avoided cost. Instead, the Commission should issue a determination, consistent with PURPA, supporting DEC's purchase of energy from the Cherokee Facility at DEC's avoided cost calculated at the time the energy is delivered to DEC.

Extending the term of the 2012 Cherokee PPA while the Commission considers the merits of the Complaint in this proceeding would unfairly burden DEC's customers, requiring them to pay for energy and capacity from the Cherokee Facility at purchase rates that are significantly above DEC's current, actual avoided costs. Moreover, such result would be contrary to PURPA's foundational "indifference" principle and would set an undesirable precedent, allowing counterparties to wait until the "eleventh hour" to file a complaint at the Commission in order to extend favorable above-market avoided energy and capacity rates, to the detriment of utility ratepayers. Finally, no Commission action is needed to compel DEC to purchase the energy from the Cherokee Facility upon termination of the 2012 Cherokee PPA. In the event no new negotiated PPA is in place starting January 1, 2021, FERC's regulations require DEC to purchase the output of the Cherokee Facility at DEC's avoided cost rates, as of the time the energy is delivered to

DEC.[13] Indeed, DEC and Complainant have begun planning for precisely this scenario, with DEC expressing the Company's willingness to memorialize an "as available" purchased power arrangement with Cherokee prior to the expiry of the 2012 Cherokee PPA. Accordingly, and as further described herein, the Commission should deny Complainant's Request for Interim Relief.

i. Complainant's request for interim relief effectively seeks preliminary injunctive relief beyond the Commission's authority to provide and Complainant has also failed to meet the standard for a preliminary injunction under South Carolina law.

Complainant's request for expedited Commission action is legally equivalent to a request for a preliminary injunction, seeking the Commission to preliminarily order DEC to continue to pay the Cherokee Facility for energy and capacity at the same stale and now excessive rates that exist in the 2012 Cherokee PPA.[14]

As an initial matter, the Commission has previously recognized that it does not have statutory authority to grant a preliminary injunction, in response to a very similar request for expedited relief absent a hearing. In Order No. 2019-521, the Commission held that

> The Complainant in this matter has requested that the Commission grant "emergency injunctive relief" against Duke Energy Carolinas. Today we address only her request for "emergency injunctive relief." This Commission has not been authorized by statute to grant injunctive relief. If injunctive relief is available to her under the facts of her case, it must be granted by a court with the jurisdiction to order such relief. One such court is the Court of Common Pleas of Lancaster County. Because the Commission is not authorized to order injunctive relief, the Complainant's request for such relief is denied.

[13] 18 C.F.R. § 292.304(d)(1).

[14] Injunction, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A court order commanding or preventing an action."); Preliminary Injunction, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.").

This Commission is a statutory creation and "its authority is limited to that granted by the legislature."[15] Consistent with the Commission's recent decision in Order No. 2019-521, the Companies are aware of no statutory grant of authority that would permit the Commission to grant the injunction requested in this case.

Even assuming *arguendo* that the Commission has the authority to grant the requested relief, the Complainant has failed to demonstrate that it will be irreparably harmed and that such extraordinary relief is warranted in this case. The standard for a court to issue a preliminary injunction is as follows:

> To obtain an injunction, the plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation. To establish a cause of action for injunction, the plaintiff must show (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law.[16]

Based on the facts and law applicable to this case, as discussed above, Complainant has failed to demonstrate that it is likely to succeed on the merits of the Complaint. For that reason alone, Duke Energy submits that Complainant has failed to adequately demonstrate the elements required to obtain a preliminary injunction or "expedited relief" and its request should therefore be denied.

Complainant has also failed to meet its burden to demonstrate how it will suffer irreparable harm if an injunction is not granted. As discussed in Section II(v) below, DEC will continue to be obligated to purchase power from the Cherokee Facility under PURPA, even assuming the interim relief is denied, so there is no risk of irreparable harm that Duke can refuse to purchase Complainant's output under PURPA. The Commission also has all necessary authority to review DEC's and DEP's current avoided costs and to determine the rates to be paid for energy and

[15] *Nucor Steel v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 543, 426 S.E.2d 319, 321-22 (1992).
[16] *Peek v. Spartanburg Reg'l Healthcare Sys.*, 626 S.E.2d 34, 367 S.C. 450 (S.C. App., 2005).

capacity from the Cherokee Facility after the term of the current 2012 Cherokee PPA expires on December 31, 2020.

In sum, the Commission has determined that it does not have the extraordinary authority to grant such "interim relief" in the form of a preliminary injunction, and, even assuming *arguendo* that the Commission has the authority to grant the relief, Complainant has failed to demonstrate that such relief is warranted.

ii. Customers would be harmed by the interim relief.

Under South Carolina's fuel clause, the customers of electric utilities are responsible for paying for all power purchased from QFs.[17] Therefore, the costs DEC incurs to purchase power from Complainant under the Cherokee PPA are passed through to DEC's customers each year, in the same way natural gas or coal fuel costs are passed through to customers. As a result, it is solely DEC's customers who are impacted by fuel costs incurred by DEC, and by extension, will be impacted by the Commission's decision in response to Complainant's Request.

The Commission should specifically be aware of the significant over-payment obligation that would arise for DEC's customers if the Commission ordered DEC to extend the 2012 Cherokee PPA. This is because the pre-existing avoided cost rates in the 2012 Cherokee PPA are significantly outdated and are now much higher than current avoided cost rates. As described previously, the capacity rates that DEC pays Complainant under the 2012 Cherokee PPA were determined based on DEC's then-prevailing avoided costs approximately eight years ago. The Companies' avoided cost rates have significantly decreased since that time. By way of illustration, as presented in the Affidavit of John Freund, DEC's estimates that if the 2012 Cherokee PPA were to be extended for a 12-month period, starting January 1, 2021, DEC's customers would pay

[17] S.C. Code Ann. § 58-27-865.

approximately **$8 million** above DEC's current avoided cost rates over that 12-month period. Extending the 2012 Cherokee PPA beyond its expiration will unfairly require DEC's customers to pay avoided cost rates significantly above what they otherwise would pay for energy and capacity from other resources.

iii. Granting the interim relief would be inconsistent with PURPA.

Additionally, extending the term of the 2012 Cherokee PPA would run counter to the most fundamental tenants of PURPA: that utility customers should be made "indifferent" to utility purchases of QF power.[18] FERC's regulations implementing PURPA expressly prescribe that electric utilities shall not be required to pay more than the avoided costs for purchases from QFs.[19] Ensuring that the rates paid to QFs accurately reflect the utility's cost of avoided energy and avoided capacity is paramount to furthering the "indifference principle" of PURPA. Extending the 2012 Cherokee PPA would upend this principle, causing DEC's customers to pay stale rates in excess of DEC's current avoided cost after the termination of the PPA.

iv. Complainant is responsible for the timing of its request and expedited relief is unwarranted.

Complainant has been aware of DEC's and DEP's avoided cost rates since the time they were first provided to Complainant, approximately 20-24 months ago. Moreover, since January 17, 2020, the Companies have provided their avoided cost rates to Qualifying Facilities through the Large QF Tariff, in compliance with Order No. 2019-881(A), which is publicly available through the Commission's e-tariff system and document management system. The Companies' standard Large QF PPA, as approved by the Commission in Order No. 2019-881(A), has also

[18] *Southern Cal. Edison Co., et al*., 71 FERC ¶ 61,269 at p. 62,080 (1995), overruled on other grounds, *Cal.Pub. Util. Comm'n*, 133 FERC ¶ 61,059 (2010) (stating that, in enacting PURPA, "[t]he intention [of Congress] was to make ratepayers indifferent as to whether the utility used more traditional sources of power or the newly-encouraged alternatives.").

[19] *See* 18 C.F.R. 292.303(a); 18 C.F.R. 292.304(a)(2).

available on the Commission's document management system since that time. The Commission undertook a comprehensive review of these avoided cost rates and contracting forms in the Companies' avoided cost proceedings in Docket Nos. 2019-185-E and 2019-186-E, and Complainant has been aware of these proceedings and the subsequent tariffs and PPAs resulting from those proceedings. Complainant has had ample time to raise any issues regarding the application of the resulting avoided cost rates and form of PPA. The urgency with which Complainant brings this Request to the Commission is self-induced as a result of Complainant's own delay in raising these issues to the Commission.

v. DEC will continue to be obligated to purchase power from the Cherokee Facility even if the interim relief is denied.

Importantly, upon expiration of the 2012 Cherokee PPA, DEC's obligation under PURPA to purchase all of the energy from the Cherokee Facility continues. Under the "mandatory purchase obligation" of PURPA, DEC's obligation to purchase a QF's output exists regardless of whether a QF has entered into a successor PPA with the utility. Where no "legally enforceable obligation" or PPA exists setting rates for purchase over a specified term, FERC's regulations allow a QF to deliver energy to a purchasing utility on an "as available" basis thereby obligating the utility to purchase the QF's power.[20] FERC's regulations require that the rates for such purchases should be based on the purchasing utility's avoided costs estimated at the time of delivery of the output to the purchasing utility.[21] As of the date of filing this Response, DEC is currently working with Complainant, at Complainant's request, to establish a short-term contract to memorialize DEC's purchase of the energy from the Cherokee Facility at DEC's avoided cost rates at the time the energy is delivered. This agreement—which is fully consistent with PURPA—

[20] 18 C.F.R. § 292.304(d)(1) (establishing rates for "as available" energy purchases); (d)(2) (establishing rates for purchases of energy and capacity pursuant to a legally enforceable obligation over a specified term).
[21] *Id*.

can remain in effect until either the Commission issues an Order in this proceeding addressing the merits of the Complaint or DEC and Complainant are able to successfully negotiate a new successor PPA that complies with PURPA.

III. CONCLUSION

While this Complaint is pending before the Commission, the most equitable result for DEC's customers, while ensuring compliance with PURPA, is for DEC to purchase the energy from the Cherokee Facility at DEC's avoided costs determined at the time of delivery to DEC. This variable "as available" rate represents DEC's actual avoided cost at the time of delivery and will ensure that DEC's customers are not paying in excess of the utility's avoided cost for the output that DEC is required to purchase under PURPA. To determine otherwise improperly prioritizes the corporate interests of LS Power over the financial impact to DEC's customers.

Dated this 8th day of December 2020.

Respectfully submitted,

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